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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK

ORIGINAL APPLICATION NO. 719 OF 1995
Cuttack this the 11th day of December/2000

D.N.Bhutia

...

Applicant(s)

-VERSUS-

Union of India & Others ...

Respondent(s)

(FOR INSTRUCTIONS)

1. Whether it be referred to reporters or not ? *Yes,*
2. Whether it be circulated to all the Benches of the Central Administrative Tribunal or not ? *No*

Somnath Som
(SOMNATH SOM)
VICE-CHAIRMAN
11-12-2000

11/12/
(D.V.R.S.G.DATTATREYULU)
MEMBER (JUDICIAL)

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CUTTACK BENCH: CUTTACK

ORIGINAL APPLICATION NO.719 OF 1995
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CORAM:

THE HON'BLE SHRI SOMNATH SOM, VICE-CHAIRMAN
AND
THE HON'BLE SHRI G.V.R.S.G.DATTATREYULU, MEMBER (J)

...

Debendra Natha Bhutia, aged about 44 years,
Son of Late Digambar Bhutia, resident of
Village - Gadakana, PO: Mancheswar Railway
Station, Bhubaneswar-17, District - Khurda,
At present working as Offset Machine Attendant
in the Office of Manager, Government of India
Text Book Press, Bhubaneswar-17, Dist-Khurda

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By the Advocates

Applicant
M/s.K.C.Kanungo
S.S.Mohapatra
P.K.Patnaik

-VERSUS-

1. Union of India represented through
Secretary, Ministry of Urban Development,
Nirman Bhawan, New Delhi
2. Director of Printing Press, Government of
India, B-Wing, Nirman Bhawan, New Delhi
3. Manager, Government of India, Text Book Press,
Bhubaneswar-17, District - Khurda
4. Nilakantha Prasad Ray, Machine Assistant,
Office of the Manager, Government of India,
Text Book Press, Bhubaneswar-17, Dist-Khurda

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By the Advocates

Respondents
Mr.A.K.Bose,
Sr.Standing Counsel
(Central)
M/s.B.Patnaik
M.K.Badu
P.K.Panda
(For Res.4)

O R D E R

MR.D.V.R.S.G.DATTATREYULU, MEMBER (JUDICIAL) : The applicant
in this case prays for quashing orders passed under Annexure-A/3
withdrawing the monetary benefits given to him and also prays
to direct the respondents to continue the applicant in the post of
Machine Assistant with effect from 17.12.1993. According to

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applicant, while he as working with Respondent No.3 as Labourer from 12.9.1974, he was promoted to the post of Machine Attendant with effect from 20.1.1978. While so, one criminal case was filed against him in S.P.E. No.29/85 for the offences under Sections 420 and 468 I.P.C. That case was ended in acquittal on 28.3.1995. The applicant represented to Respondent No.3 by representations dated 31.3.1995, 27.4.95, 29.5.1995 and 1.8.1995, stating that he is to be promoted to the post of Machine Assistant since he is the senior most, but his junior Respondent No.4 was promoted. The applicant was considered by the D.P.C. and held to be fit for promotion. The applicant is in no way responsible for any of the orders passed in Original Application filed by Respondent No.4. The applicant was given the benefit of the financial amount due to him in the promotional post by the order bearing No.A-46011/1/75-Estt.-3107 dated 5.12.1995 under Annexure-A/2. But surprisingly it was stated that by the respondents subsequently that he has to return the amount as per the orders passed under Annexure-A/3. It is also the contention of the applicant that he must be deemed to be in promotional post from 27.12.1993.

2. The respondents resisted the application by stating that due to mistake the amount was sanctioned to the applicant and therefore, they are entitled to recover the amount paid to the applicant. It is also stated that the higher officers have directed the Office Manager for recovering the amount already paid to the applicant, therefore, the prayer of the applicant cannot be allowed.

3. We heard the learned counsel appearing for both sides

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and considered various annexures filed in this case. The point for consideration is whether the directions sought for by the applicant have to be given or not. The fact that the applicant was ripe for promotion at the time when the other Respondent 4 was promoted is not in dispute. The main point for determination in this application depends on the following points to be considered.

- i) It is not in dispute that the applicant was due for promotion;
- ii) It is not in dispute that no D.P.C. was held for considering the suitability of the applicant for promotion to the promotional post;
- iii) Even the adhoc appointment of Res.4 was provisional for a short time, but his continuation for a number of years on adhoc basis without being considered by the D.P.C., whether Respondent 4 is suitable for promotion according to law or not;
- iv) Is the applicant anywhere responsible for his not being promoted to the post in question;
- v) Whether the Department has initiated any disciplinary action on the basis that a criminal case was pending against the applicant;
- vi) Even taking the above point as fact, there is nothing on record to show that any action was initiated against the applicant on the basis of alleged pendency of the criminal case

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~~After~~ the Respondents 1 to 3 were serious that the applicant was involved in a serious case, they ought to have initiated some departmental proceedings against the applicant. This shows that the Department was aware of the criminal proceedings against the applicant, ^{and} the Department thought that it is not necessary to initiate any departmental proceedings. Once the departmental proceedings are not in existence there is no bar for the Respondents 1 to 3 to consider the applicant for the next promotion post, that too a selection post to which the D.P.C. has to be convened and decision has to be taken whether the applicant is suitable for promotion or not. This

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constitutional obligation to constitute the D.P.C. at the time when the applicant was ripe for promotion was not discharged by the Respondents 1 to 3, which is flagrant violation of the instrumentalities of the State having the mandatory duty to perform at a particular time. The service career of individuals is limited span from one post to another, that must be considered at the appropriate level. It cannot be indefinitely postponed, because, as per the saying that "the ^{and time.} time and tide waits for none", the days, weeks and months run. Here in this case ^{years now} ~~orders~~ run, what is the fate of the applicant? Whether his suitability for promotion can be considered or not after the concerned D.P.C. is convened and decision is taken and if he is found not suitable that ends doom's day of the applicant. If he is found to be suitable, then the fortune smiles on the face of the applicant and makes him more dedicated to service, because he got a jump in his service career from one post to higher post. The satisfaction in the service is only getting the promotional opportunity from stage to stage. If this is denied, nothing is gained in the mental satisfaction of the employee. This is his crucial crux effecting the service jurisprudence. In this particular case, this was not done. The learned Advocate appearing for the Respondents have tried to impress upon this Tribunal stating that since the criminal case was pending against the applicant, he could not be considered for promotion. When the law says ^{is} ~~x~~ that unless the departmental action is taken against him, he has to be considered for promotion, even if the criminal case is pending, the promotion need not actually be effected, but it must be kept under the sealed cover until

the necessary clearance has come. This has not been done in this case.

4. As per the above reasoning since the Respondents 1 to 3 are responsible for not considering the applicant for promotion, the burden is on the respondents to show under what constraints they could not convene the D.P.C. in time to consider the applicant for promotion. As per the narration of the events, the applicant was exonerated of the criminal charge on 28.3.95. Then he approached the Department not only claiming the monetary benefits to the post held by his junior in the promotional cadre, he also claimed the promotional orders. This is quite evident from the narration that was made by the applicant regarding his representations made on 31.3.1995, 27.4.1995, 29.5.1995 and 1.8.1995. The final representation is dated 27.4.1995 under Annexure-A/1. The respondents are silent without informing the applicant what is the action they are going to take on the said representation made by the applicant. That ^{much} ~~much~~ with regard to factual aspect of the case.

5. Now coming the question of the actual point involved, it is seen from the reply filed by the respondents that in Para-4(b) (At Page-2) that the applicant requested the respondents for releasing the benefits for which he was entitled. It appears that the Department has addressed the S.P., CBI, Bhubanesar by letter dated 7.4.1995 for giving the necessary advice to release the benefits of the applicant. The S.P., C.B.I. intimated by the letter dated 3.5.1995 that the Department has to seek the advice from the Headquarters to release the benefits of the applicant. It was stated in the reply as follows :

"...

"...In view of above, Headquarters office was requested vide this office Endt. No.C_13014/1/83-Vig (Vol-II)/5000 dated 14.6.1995 for giving necessary advice to release the benefits. The headquarters office vide their Office Memo No.C-13015/1/19/84-AV dated 25.7.95 intimated that Manager, as appointing/disciplinary authority may examine the case with reference to its details and the judgment and decide the matter of allowing benefits as per rules".

The ^{scanning} sentences of this paragraph would go to show that the headquarters was requested ⁽ⁱ⁾ for giving the necessary advice (ii) regarding releasing of the benefit, (iii) the headquarters intimated the Manager, who happens to be the appointing as well as the disciplinary authority, asking him to examine the case with reference to its detail and the Department to decide the matter. Therefore, it is not as if the headquarters is not aware of the request made by the Manager of the Department regarding releasing the benefits of the applicant. Even the headquarters had given the discretion, (to put it in another fashion) the authority to decide whether to release the benefits or not, giving the guidelines. The Manager exercised the said discretion and allowed the monetary benefits as stated in Annexure-A/2. This information was given to the headquarters also as seen from this. This is dated 28.9.1995. Even the impugned order came by the orders dated 5.12.1995, i.e., after a gap of few months. It refers to other instructions of the headquarters dated 17.11.1995 and the order dated 28.9.1995, i.e. Annexure-A/2 is withdrawn. Surprisingly the respondents have not filed what are the instructions of the headquarters referred to in Office Memorandum dated 5.12.1995, in which the instructions are stated to be dated 27.11.1995. The basis for the said instructions have not been shown either by the applicant or by the respondents to the Court even as on to-day. The question that the amount was released to the applicant

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subsequently on his giving undertaking is of no use, because, undertaking is the routine matter, but that will not give a right to withdraw the sanction of the amount that was already passed to be disbursed to the applicant unless the grounds are specified to show on what basis the orders releasing the amount are either illegal or incorrect. It has to be mentioned here that though Annexure-R/5 is the extract of the Director of Printing, which is dated 27.11.1995 is filed as stated in the above paragraph, the reasons for withdrawing the orders of the Manager dated 28.9.1995 under Annexure-A/2 are not mentioned, (to put it in another fashion) what is the illegality in the said order dated 28.9.1995 is not mentioned. Therefore, this letter dated 17.11.1995 (Annexure-R/5) suffers from the voice of non-disclosing the reasons, which would not vitiate the order passed under Annexure-A/2 dated 28.9.1995. Therefore, the order dated 28.9.1995 stands as it is.

The stand of the respondents in the counter that

Respondent No.4 has filed Original Application 87/94 and obtained some stay orders and therefore, there is no fault on the part of the Department in not promoting the applicant is devoid of any merit. Even the stay orders filed by the Respondents as Annexure-R/6 would not show that he was directed by the Tribunal to continue. But on the other hand it is clear that this order is passed only on the applicant being the intervenor in the said proceedings. It is stated in Paragraph 2 of the said order as under :

"The intervenor Shri D.N.Bhutia is stated to have been exonerated from criminal charges on 28.3.1995 by the Additional Chief Judicial Magistrate, Bhubaneswar, in S.P.E. No.29/85. Apparently, this fact is known to the Department, since they have duly taken action to permit the drawal of monetary benefits in respect of

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Shri D.N.Bhutia vide their Office Order No.O.M.46011/1/95-Estt./2665 dated 28.9.1995. In the same order, it is also mentioned that these benefits could not be extended to Shri Bhutia on account of a pending disciplinary proceeding. It would therefore, seem that the disciplinary proceedings have also been dropped since, hence extension of monetary benefits to Shri Bhutia vis-a-vis his junior Shri N.P.Ray as mentioned in the Memo cited. Thus it is clear that after 28.3.1995 and 28.9.1995, there are neither any criminal charges nor any disciplinary proceedings pending against Shri Bhutia.

Under the circumstances, there is no reason as to why Shri Bhutia should continue to be denied promotion to the post of Offset Machine Assistant, if he is otherwise eligible, by retaining, at the same time, the applicant Shri N.P.Ray, who is admittedly is his junior.

It is, therefore, directed that the case of Shri D.N.Bhutia for adhoc promotion to the post of Offset Machine Assistant be considered forthwith, as per rules, if he is otherwise eligible. The stay earlier granted on 2.3.1994 no longer operates".

This order passed by the Tribunal in Misc.Application 22/96 has taken note of the fact that the Department is fully aware of the fact that the applicant was exonerated of the criminal charges and the Department also permitted the drawal of monetary benefits to the applicant and it is clearly stated that the earlier stay granted no longer operates. In fact this Annexure-R/6 has clearly endorsed the payment of drawal of the monetary benefits in respect of the present applicant. It does not show that the Department has anywhere taken the stand that the drawal of monetary benefits by the applicant is illegal and incorrect. This order is dated 29.1.1996. Therefore, the present contention that there is any mistake in allowing the monetary benefits to the applicant is devoid of any force.

It is the contention on behalf of the respondents that since the applicant was not actually promoted he is not entitled for the scale of pay in the promotional post and allowing him to draw that benefit is clearly a mistake which gives the right to the Department to recover the amount. It is seen from the

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averments made in the reply that the applicant demanded the release of the monetary benefits as per judgment dated 2.3.1987 passed by the Hon'ble C.A.T., Madras Bench in O.A.140/86. Therefore, the granting of the monetary benefits is based on the judgment of the C.A.T. It is not as if a charity is shown to the applicant by permitting him to have the monetary benefits, but his right to claim the monetary benefits has flown from the judicial approach dealing with the persons, who were ripe for promotion and were not promoted and in such circumstances, whether they are entitled for monetary benefits or not since the time they were due for promotion is the judicial verdict and basing on the said judicial verdict, the fund was released to the applicant under Annexure-A/2. It is not the contention even now that the judgment in O.A.140/86 is not applicable to the applicant. When once the applicant comes within the legal purview of the judgment, rationality and the law as enunciated in O.A.140/86 of the Madras Bench of the C.A.T., there is nothing illegality attached to the releasing of the funds under Annexure-A/2. Therefore, there is nothing illegality attached to it. The administrative instructions cannot have the overriding effect of the law declared and applicable to the present applicant in O.A.140/86. That is the reason it was stated in the earlier paragraphs of our order that the reasons on the basis of which the monetary benefits allowed were directed to be withdrawn were not mentioned in any of the correspondences given to the applicant or by stating specifically in the counter or even at the time of arguments. Therefore, the act of trying to recover the amount is completely illegal.

The other question that has been raised by the learned

Advocate for the Respondents is that there was already one person working in the said post and though the applicant was not actually promoted, paying him the benefits in the promotional post is illegal and there cannot be two payments in the same post, therefore, they can recover the amount. This argument is also not sustainable. It is seen from the orders passed in Annexure-R/6 that there are two vacant posts, may be one by Direct Recruitment and it is sought for the continuation of Respondent No.4 in addition to the applicant, which was left open to be decided by the respondents as per the orders under Annexure-R/6. The fundamental points as seen from here is, it is the Department that has to blame itself for not considering the applicant for the promotional post and not making an adhoc appointment of Respondent No.4. The applicant cannot question the appointment of Res.4 at that time, because, it is the selection post and the DPC may be convened at any time. Even without following the procedure of screening by the DPC and allowing Res.4 to continue for so many years is a mistake continuing from day to day and an illegality perpetuated without any check, for which the applicant is in no way responsible. The administrative lapse or the administrative mistake that was committed by the administration should not stand in the way of giving the necessary advantage or benefits to which one is entitled to under law. The applicant ought to have been promoted on adhoc basis in stead of Respondent No.4. That was not done. The responsibility is of the Head of the Department. The D.P.C. was not held. It is the mistake of the Department. No disciplinary proceedings were initiated against the applicant by placing him under suspension or otherwise on account of the pendency of the criminal case. This is another mistake committed by the Department. Had these steps been taken one after another

and the promotion was not given to the ^{apphant} ~~Res No. 4~~, then the right of the applicant to get the promotional benefits would have been extinguished, but not in the present circumstances where the Department has not taken any care in these matters and the applicant was ultimately acquitted in the criminal case. Therefore, he is entitled to all the benefits that accrued to him as per the time he was ripe for promotion. Therefore, when once the benefits have already been given to the applicant under Annexure-A/2, these cannot be withdrawn on any ground as per the circumstances of this case.

With regard to the other relief, the applicant prays for direction that he should be deemed to have been promoted with effect from 17.12.1993, for this also he is entitled. In the result, the Original Application is allowed with the following directions.

- i) Orders passed in Annexure-A/3 are hereby quashed.
- ii) Respondents are directed to treat the applicant as if he is in the post of Offset Machine Assistant w.e.f. 17.12.1993; and
- iii) necessary orders, if any, should be passed within three months from the date of receipt of this order.

Before parting with this case, we would like to make a declaration that allowing of this applicant's application shall not be taken to mean that the Tribunal has given the findings that even if there are no two posts, salary must be paid to two persons on account of the mistake committed by the administration. The reasoning and the finding in this application is confined to the peculiar facts and circumstances and law of this particular case and it should not be treated as precedent to any other case. No order as to costs.

Somnath Som
(SOMNATH SOM),
VICE-CHIEF JUSTICE

(11/12)
(D.V.R.S.G.DATTATREYULU)
MEMBER (JUDICIAL)

B.K.SAHOO//